UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC., Plaintiffs	)	
v.	)	Docket No. 1:11-CV-99
PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM SORRELL, in his official capacity as the ATTORNEY GENERAL OF THE STATE OF VERMONT; and JAMES VOLZ, JOHN BURKE, and DAVID COEN, in their official capacities as members of THE VERMONT PUBLIC SERVICE BOARD, Defendants	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Nature of Action

1. The Vermont Yankee Nuclear Power Station (the "Vermont Yankee Station") in Vernon, Vermont is one of New England's most important suppliers of electric energy. Its output is sufficient to meet approximately 75 percent of Vermont's energy demands, and its capacity of over 600 Megawatts ("MW") of power is almost 12 times the capacity of the next largest generator in the state. It employs approximately 650 people and has in recent years paid to Vermont approximately $13 million per year in taxes and other fees. The Vermont Yankee Station is safe, as demonstrated by its consistent receipt of the highest color rating (green) on all

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Performance Indicators tracked by the United States Nuclear Regulatory Commission's four-color (green, white, yellow, and red) rating system. And the Vermont Yankee Station has an outstanding operational record, having completed 532 days of continuous operation in April 2010, pausing only to refuel and to perform required maintenance, inspections, and tests. According to a 2008 study of the Vermont Yankee Station commissioned by Vermont's Department of Public Service, "Overall, many station managerial and technical areas meet or exceed industry standards for performance. The station is operated and maintained in a reliable manner." Nuclear Safety Associates, *Reliability Assessment of the Vermont Yankee Nuclear Facility*, at 2 (Dec. 22, 2008) (redacted public version).

2. On March 21, 2011, the United States Nuclear Regulatory Commission ("NRC") renewed the operating license for the Vermont Yankee Station for a 20-year period. It did so only after the NRC staff conducted "thorough and extensive safety and environmental reviews of the application" for renewal. The Renewed Facility Operating License states that "the Commission hereby licenses ... [p]ursuant to Sections 104b of the Atomic Energy Act of 1954, as amended (the Act), and 10 CFR Part 50, 'Licensing of Production and Utilization Facilities,' Entergy Nuclear Vermont Yankee, LLC to possess and use, and Entergy Nuclear Operations, Inc. to possess, use, and operate the facility as a utilization facility at the designated location on the Entergy Nuclear Vermont Yankee, LLC site." Renewed Facility Operating License No. DPR-28 (Ex. A hereto), at 2. The Renewed Facility Operating License "is effective as of the date of issuance and shall expire at midnight on March 21, 2032." *Id.* at 14. Thus, under the exclusive licensing authority conferred upon the federal government by federal law, the Vermont Yankee Station may continue to operate through March 21, 2032.

3. Alone among the fifty States, however, Vermont has enacted laws asserting its authority to control the operation of an existing federally licensed nuclear power plant in

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Vermont (of which there is only one in Vermont, the Vermont Yankee Station). Vermont asserts that it has authority, irrespective of any federal license, to grant or deny a "certificate of public good" ("CPG") to the Vermont Yankee Station, and asserts that without such a state-issued CPG the Vermont Yankee Station may not continue to operate. Vt. Stat. Ann. tit. 30, § 248(e)(2).

4. Vermont initially enacted legislation delegating to the State Public Service Board ("PSB") the power to issue or withhold a CPG.

5. In 2006, Vermont enacted new legislation transferring authority over CPG issuance directly to its General Assembly. The 2006 statute, entitled "An Act Relating to a Certificate of Public Good for Extending the Operating License of a Nuclear Power Plant," states that "[i]t remains the policy of the state that a nuclear energy generating plant may be operated in Vermont only with the explicit approval of the General Assembly." 2006 Vt. Acts & Resolves No. 160 ("Act 160"). Vermont officials have announced that the legislative approval required by Act 160 to authorize the operation of the Vermont Yankee Station beyond March 21, 2012, the date on which the Vermont Yankee Station's state CPG expires, will not be forthcoming.

6. The question presented by this case is whether the State of Vermont, either through a state administrative agency (the PSB) and/or the state legislature (the General Assembly) may effectively veto the federal government's authorization to operate the Vermont Yankee Station through March 21, 2032. The answer is no.

7. Vermont's attempt to shut down operations at the Vermont Yankee Station through regulatory or legislative denial of a CPG is preempted by the federal Atomic Energy Act ("AEA"), 42 U.S.C. § 2011 *et seq.*

8. Under the AEA, a State may not interfere with the federal government's exclusive authority over the operation of a nuclear power plant. A State's regulation of the "construction or operation of a nuclear powerplant[,] ... even if enacted out of non-safety concerns, ... directly

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conflict[s] with the NRC's exclusive authority over plant construction and operation." *Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 212 (1983) ("*PG&E*"). Vermont's CPG scheme, whether administered by the PSB or the General Assembly, interferes with exclusive federal authority over the continued operation of a nuclear power plant.

9. Under the AEA, a State also may not interfere with the federal government's exclusive authority over the radiological safety of nuclear power plants. Any state regulation of a nuclear power plant "grounded in safety concerns falls squarely within the prohibited field." *Id.* at 213. Vermont's CPG scheme has been employed in a way that reveals its focus on nuclear safety concerns that are entrusted exclusively to the federal government.

10. Vermont officials have further stated that they might condition any favorable exercise of the State's supposed licensing authority upon the wholesale sale of power generated by the Vermont Yankee Station to Vermont retail utilities at preferential rates compared to the rates charged to non-Vermont retail utilities. This condition coerces Plaintiff Entergy Nuclear Vermont Yankee, LLC ("ENVY") to enter into below-market power purchase agreements ("PPAs") with Vermont's retail utilities that will effectively result in ENVY and out-of-state consumers subsidizing the electricity bills of Vermont's consumers.

11. A state's attempt effectively to coerce the sale of wholesale interstate power at a certain rate is preempted by federal law. The Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq.*, vests the Federal Energy Regulatory Commission ("FERC") with exclusive authority over wholesale power sold in the interstate market. The power produced by the Vermont Yankee Station is entirely sold into the interstate wholesale market.

12. Even if not preempted, a condition on the Vermont Yankee Station's continued operation that unconstitutionally discriminates in favor of in-state over out-of-state residents violates the Commerce Clause, U.S. Const. art. I, § 8.

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13. By this action, Plaintiffs ENVY, the NRC-licensed owner of the Vermont Yankee Station, and Entergy Nuclear Operations, Inc. ("ENOI"), the NRC-licensed operator of the Vermont Yankee Station, seek a declaratory judgment that Vermont may not force the cessation of federally licensed operations at the Vermont Yankee Station or regulate the Vermont Yankee Station based on radiological safety concerns.

14. By this action, ENVY and ENOI also seek a declaratory judgment that Vermont may not condition its favorable exercise of licensing authority upon ENVY's sale of wholesale power to Vermont utilities at rates below those authorized by FERC.

15. By this action, Plaintiffs also seek a preliminary and permanent injunction prohibiting Vermont officials from taking any action to force the Vermont Yankee Station to cease operations as of March 21, 2012.

The Parties

16. Plaintiff ENVY is a limited liability company. ENVY's sole member is another limited liability company named Entergy Nuclear Vermont Investment Company, LLC, which in turn has a sole member named Entergy Nuclear Holding Company #3, LLC (also a limited liability company), which in turn has a sole member named Entergy Nuclear Holding Company. Entergy Nuclear Holding Company is a corporation that is incorporated in Delaware and maintains its principal place of business in Texas.

17. Plaintiff ENOI is a corporation that is incorporated in Delaware and maintains its principal place of business in Mississippi.

18. Plaintiffs are co-holders of NRC Facility Operating License No. DPR-28 and Renewed Facility Operating License No. DPR-28.

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19. Defendants James Volz, John Burke, and David Coen are the current members of the PSB, which is an agency of the State of Vermont. The PSB is authorized by Vermont law to supervise the rates, quality of service, and overall financial management of Vermont's public utilities: electric, gas, telecommunications, and private water companies. The PSB is also authorized by Vermont law to review the environmental and economic impacts of proposals to purchase energy supply or to build new energy facilities; to monitor the safety of hydroelectric dams; to review rates paid to independent power producers; and to oversee the statewide Energy Efficiency Utility.

20. Defendant Peter Shumlin is the current Governor of the State of Vermont.

21. Defendant William Sorrell is the current Attorney General of the State of Vermont.

Jurisdiction and Venue

22. The Court has subject matter jurisdiction over the claims asserted in this action pursuant to 28 U.S.C. § 1331 (federal question) because this action involves interpretation of the AEA, 42 U.S.C. § 2011 *et seq.*, the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10101 *et seq.*, and the FPA, 16 U.S.C. § 791a, *et seq.*, as well as the Supremacy and Commerce Clauses of the United States Constitution, U.S. Const. art. VI & art. I, § 8, and because the action seeks to prevent state officials from interfering with federal rights.

23. Additionally, the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 (diversity) because the Plaintiffs, citizens of Delaware, Mississippi, and Texas, are completely diverse from the Defendants, citizens of Vermont, and the value of the object of the litigation, an operating nuclear power plant, exceeds $75,000.

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24. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391 because each of the Defendants resides in the State of Vermont. Venue is also properly vested in this Court because the Vermont Yankee Station is located in Vernon, Vermont, and most of the conduct that underlies this action occurred in Vermont.

25. There is a present and actual controversy between the parties.

26. The relief requested is authorized pursuant to 28 U.S.C. §§ 2201 and 2202 (declaratory judgment), 28 U.S.C. § 1651(a) (injunctive relief), and 42 U.S.C. § 1983 (declaratory and injunctive relief available for Commerce Clause violations, *see Dennis v. Higgins*, 498 U.S. 439, 440 (1991)).

Substantive Allegations

I. REGULATORY OVERSIGHT OF PRIVATE NUCLEAR REACTORS IN THE UNITED STATES

27. The Atomic Energy Act ("AEA"):

> stemmed from Congress' belief that the national interest would be served if the Government encouraged the private sector to develop atomic energy for peaceful purposes under a program of federal regulation and licensing. The Act implemented this policy decision by opening the door to private construction, ownership, and operation of commercial nuclear-power reactors under the strict supervision of the [NRC].

English v. Gen. Elec. Co., 496 U.S. 72, 81 (1990). The AEA "provid[es] for licensing of private construction, ownership, and operation of commercial nuclear power reactors for energy production under strict supervision by the [NRC]." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 63 (1978).

28. The NRC in turn has created a comprehensive and rigorous licensing procedure for nuclear facilities. The NRC's licensing process includes, *inter alia*, assessment of the processes to be performed at the facility, the operating procedures, the facility and equipment,

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the use of the facility, and other technical specifications to ensure that any applicant will comply with all NRC regulations and that such operation will be conducted in a manner that protects public health and safety. In addition, the NRC assesses the financial soundness of the applicant to ensure both that the proposed facility can be successfully completed and that the applicant will have sufficient funds to decommission the proposed facility in the future. *See* 10 C.F.R. §§ 50.33, 50.40.

29. States have "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like," which enables them to regulate the decision whether in-state utilities selling power to in-state retail consumers should be allowed to construct new electric generating plants. *PG&E*, 461 U.S. at 212.

30. Such traditional state authority does not extend to entities that sell their electric power entirely at wholesale in the interstate market; instead, that market is under the exclusive jurisdiction and supervision of FERC. The "economic aspects of electrical generation have been regulated for many years and in great detail by the states," but only subject to the significant "exception of the broad authority of [FERC] over the need for and pricing of electric power transmitted in interstate commerce." *Id.* at 205-06 (citations omitted).

31. States likewise have no traditional authority over the licensing and operation of nuclear power plants. Under the AEA, the NRC has "exclusive authority over plant construction and operation," such that any attempt by a state or local government "to regulate the construction or operation of a nuclear powerplant … would clearly be impermissible … even if enacted out of non-safety concerns." *Id.* at 212; *see also id.* at 207 ("The AEC [the predecessor of the NRC] … was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials.").

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32. Nor do States have any authority to regulate the radiological safety of nuclear power plants. "[T]he federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." *Id.* at 212. Thus, state laws are invalid if they have "some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *English*, 496 U.S. at 85.

33. The AEA allows a State to enter into an agreement with the NRC whereby the State agrees to shoulder some of the burden of regulating nuclear facilities. *See* 42 U.S.C. § 2021. Even for such an "agreement state," Congress has made clear that issues relating to "construction and operation" of nuclear facilities remain within the exclusive control of the NRC. *Id.* § 2021(c). Vermont has declined to become an agreement state.

34. In 1982, Congress enacted the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. §§ 10101-10270, which "establishe[d] a schedule for developing a permanent federal repository" of spent nuclear fuel and "[a]s an alternative to a permanent facility, … also establishe[d] a federally-monitored temporary storage program." *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1242 (10th Cir. 2004), *cert. denied sub nom. Nielson v. Private Fuel Storage, LLC*, 546 U.S. 1060 (2005). Pursuant to the AEA and the NWPA, "the Atomic Energy Commission and the NRC have promulgated detailed regulations regarding the operation of nuclear facilities, including the storage of SNF [*i.e.*, spent nuclear fuel]." *Id.*; *see also id.* at 1250 ("Under the federal licensing scheme …, it is not the states but rather the NRC that is vested with the authority to decide under what conditions to license an SNF storage facility.").

35. In light of this extensive field preemption of state regulation of nuclear facilities in the areas of licensing, construction and operation, storage of spent nuclear fuel, and radiological health and safety, most states containing nuclear facilities have not sought to regulate in such areas. In those instances where states have attempted to intrude into areas

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subject to NRC's exclusive authority, federal and state courts have repeatedly enforced federal preemption.

II. REGULATORY OVERSIGHT OF THE WHOLESALE POWER MARKET

36. In the continental United States, electricity is delivered over three major networks or "grids": the "Eastern Interconnect" and the "Western Interconnect" (which are connected to each other) and the "Texas Interconnect" (which covers most of Texas). Other than in the parts of Texas covered by the "Texas Interconnect," any electricity that enters the grid in the continental United States "becomes part of a vast pool of energy that is constantly moving in interstate commerce." *New York v. FERC*, 535 U.S. 1, 8 (2002).

37. Section 201(b) of the FPA vests FERC with "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982); *see also* 16 U.S.C. § 824(b) (providing federal jurisdiction over "the transmission of electric energy in interstate commerce and … the sale of electric energy at wholesale in interstate commerce").

38. The FPA requires that all wholesale electricity rates be "just and reasonable," 16 U.S.C. § 824d(a), and requires regulated utilities to file compilations of their rate schedules (known as "tariffs") with FERC and to provide power to retail (distribution) electric utilities on the terms and prices set forth therein, *id.* § 824d(c).

39. In light of reforms in recent decades to develop competitive electricity markets, FERC has begun permitting certain wholesale sellers of electricity to file "market-based" tariffs that do not specify the exact rate to be charged but instead allow the seller to enter into freely negotiated contracts with purchasers or to sell into the open wholesale markets. FERC approves a market-based tariff only where a utility demonstrates that it does not have or has adequately

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mitigated market power, lacks the capacity to impose other barriers to entry, and does not provide preferences to its affiliates. *See generally* Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 72 Fed. Reg. 39,904 (July 20, 2007). The terms of such contracts, whether filed with the Commission or merely executed pursuant to market-based rate authority granted by the Commission, are subject to the Commission's exclusive jurisdiction and may be set aside "only if FERC concludes that the contract seriously harms the public interest." *NRG Power Mktg., LLC v. Me. Pub. Utilis. Comm'n*, 130 S.Ct. 693, 700 (2010) (quoting *Morgan Stanley Cap. Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530 (2008)).

40. In 1996, FERC mandated open access to the nation's transmission grid to allow, among other things, greater competition among wholesale generators. *See generally* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000) *(per curiam)*, *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). Later, FERC encouraged the voluntary formation of Regional Transmission Organizations ("RTOs") to administer the transmission grid on a regional basis. *See generally* Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 810 (Jan. 6, 2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607, 611 (D.C. Cir. 2001) *(per curiam)*. ISO New England Inc. ("ISO-NE"), an independent, non-profit corporation, is the RTO that serves Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. ISO-NE has three primary responsibilities: (1) to ensure minute-to-minute reliable operation of New England's bulk electric power system; (2) to develop, oversee, and fairly administer New England's wholesale electricity marketplace; and (3) to manage the bulk electric power system's and wholesale markets' planning processes to

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address New England's future electricity needs. ISO-NE, Overview, *available at* http://www.iso-ne.com/aboutiso/co_profile/overview/ index.html.

41. The Vermont Yankee Station is a merchant electricity plant that sells its power only at wholesale on the interstate market, and therefore the rates charged for that power are subject to the exclusive regulation of FERC.

42. In 2002, ENVY initially applied for and received authorization from FERC to sell its power into the ISO-NE interstate market at market-based rates. FERC has periodically renewed its authorization for ENVY to sell at market-based rates so that such authorization has remained in effect without interruption from 2002 to the present date.

III. THE VERMONT YANKEE STATION

A. Description of the Vermont Yankee Station and its Operations

43. The Vermont Yankee Station, the only nuclear power plant constructed or operated in the history of the State of Vermont, has been providing clean, reliable wholesale power to utilities (which in turn sell the power at retail to end-users) in Vermont and other States throughout the Northeast since 1972.

44. The Vermont Yankee Station employs approximately 650 people who live in communities throughout Vermont and the surrounding areas. It provides approximately $100 million annually in direct and indirect economic benefit to the State of Vermont and the surrounding region through payroll, taxes, and local purchases of goods and services.

45. The Vermont Yankee Station accounts for approximately one-third of the base-load power used by Vermont electricity customers and additionally provides a substantial amount of power to out-of-state consumers. The Vermont Yankee Station operates with virtually no emission of regulated air pollutants (such as nitrogen oxides and sulfur dioxides) or

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greenhouse gases (such as carbon dioxide) from its core electric generating activities. The Vermont Yankee Station has consistently operated in compliance with safety standards promulgated and enforced by the NRC, consistently receiving the highest color rating (green). NRC, *Reactor Oversight Process*, http://www.nrc.gov/NRR/OVERSIGHT/ASSESS/index.html (explaining color rating system). The Vermont Yankee Station also has a proven reliability record, recently operating for 532 continuous days, after which the plant paused only to refuel and to perform required maintenance, inspections, and tests.

46. Following its construction and initial licensing, the Vermont Yankee Station was owned by Vermont Yankee Nuclear Power Corporation ("VYNPC"), a joint venture of New England retail utilities. ENVY acquired the Vermont Yankee Station from VYNPC on July 31, 2002.

47. The Vermont Yankee Station receives authorization to operate from the NRC through issuance of a license after an extensive federal review process that includes a comprehensive environmental review under the federal National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, among other laws. On March 21, 2011, the NRC granted a 20-year renewal of the Vermont Yankee Station's license, so that the Vermont Yankee Station is authorized to operate through March 21, 2032. Ex. A.

48. Because the power produced by the Vermont Yankee Station is sold only into the interstate wholesale market, subject to the exclusive jurisdiction of FERC, neither the Vermont General Assembly nor the Vermont PSB has the authority over the sales of power generated by the Vermont Yankee Station that those bodies might have over sales of power by state-regulated retail utilities to end-user customers.

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B. Renewal of the Vermont Yankee Station's Federal License

49. The Vermont Yankee Station's original 40-year NRC license extended to March 21, 2012. On January 27, 2006, ENVY and ENOI applied to the NRC for a license extension of 20 years. This triggered an extensive, more than five-year review process by NRC into ENVY's and ENOI's continued operation of the Vermont Yankee Station. Among the actions taken by the NRC in reviewing the licensing renewal application were:

- Extensive audits of ENVY's Aging Management Programs and Aging Management Reviews to determine whether the Vermont Yankee Station can operate without undue risk to the public's health and safety after March 21, 2012;
- Extensive audit of ENVY's Scoping and Screening Methodology to ensure that ENVY is adequately reviewing its systems for any radiological health and safety risks;
- Multiple site inspections to perform NRC's own analysis of safety risks; and
- Multiple public meetings and hearings to address environmental and safety concerns about the continued operation of the Vermont Yankee Station.

A full description of the review procedures in which the NRC engaged regarding ENVY's application for licensing renewal is available on the NRC's website at *http://www.nrc.gov///licensing/renewal/applications/vermont-yankee.html#schedule*.

50. On March 21, 2011, following "the NRC staff's thorough and extensive safety and environmental reviews of the application" (Press Release, NRC, NRC Will Renew Vermont Yankee Operating License For An Additional 20 Years (Mar. 10, 2011)), the NRC issued a Renewed Facility Operating License (Ex. A) for continued operation of the Vermont Yankee Station from March 22, 2012 through March 21, 2032. As a matter of federal law, therefore, the Vermont Yankee Station is fully licensed for operation for another two decades.

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IV. VERMONT REGULATORS' ASSERTION OF AUTHORITY OVER THE VERMONT YANKEE STATION

51. During the summer of 2001, the then-owner of the Vermont Yankee Station, VYNPC, invited bids to buy the Vermont Yankee Station after the PSB did not approve an earlier attempted sale. Following a successful bid for ENVY to acquire the Vermont Yankee Station, VYNPC petitioned the Vermont PSB to approve the sale of the Vermont Yankee Station to ENVY. ENVY and ENOI participated in that proceeding, ultimately requesting the PSB to issue them a CPG to own and operate the Vermont Yankee Station.

52. The PSB subjected the parties, including ENVY, VYNPC, and certain of its shareholders, to a 10-month proceeding, holding multiple hearings and ordering substantial discovery about the sale. As part of its ultimate decision, the PSB considered whether to order the immediate or future shutdown of the Vermont Yankee Station. Vt. Pub. Serv. Bd., Dkt. No. 6545, Final Order, at 15-16 (June 13, 2002).

53. Faced with the PSB's assertion of authority over the fate of the Vermont Yankee Station, and the attendant risks to the successful completion of the sale of the Vermont Yankee Station, ENVY, ENOI, VYNPC, and its Vermont shareholders negotiated a Memorandum of Understanding ("MOU") with the Vermont Department of Public Service ("DPS") that resulted in ENVY making substantial monetary concessions with respect to energy rates and commitments regarding the future decommissioning of the Vermont Yankee Station, in exchange for the DPS agreeing to recommend to the PSB that the sale be approved and that the PSB issue a CPG to ENVY and ENOI.

54. As a condition of the MOU, DPS required ENVY and ENOI to agree that the CPG issued to ENVY and ENOI would authorize the operation of the Vermont Yankee Station

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only until March 21, 2012 (the date of the expiration of the Vermont Yankee Station's initial NRC license), and that ENVY would be forced to seek another CPG to operate beyond that date.

55. DPS also required ENVY and ENOI to agree in the MOU "that the Board has jurisdiction under current law to grant or deny approval of operation of the [Vermont Yankee Station] beyond March 21, 2012" and "to waive any claim … that federal law preempts the jurisdiction of the [PSB] to take the actions and impose the conditions agreed upon in this paragraph to renew, amend or extend the [CPG] to allow operation of the [Vermont Yankee Station] after March 21, 2012, or to decline to so renew, amend or extend."

56. As described in more detail in paragraphs 60-81, *infra*, Vermont later repudiated the MOU, breaching that agreement and excusing ENVY's and ENOI's obligation to further comply with its conditions (specifically, the waiver provision) by enacting statutes eliminating the PSB's "jurisdiction under current law" as set forth in the terms of the MOU and instead requiring the direct approval of the Vermont General Assembly before the PSB could issue a CPG for the Vermont Yankee Station's post-March 21, 2012 operation or for the storage of spent nuclear fuel derived from post-March 21, 2012 operation.

57. Vermont repudiated the MOU in at least one other respect: Vermont officials have made clear following the MOU's execution that radiological safety is a key focus of their efforts to regulate and indeed shut down the Vermont Yankee station. When the MOU was signed, ENVY and ENOI had no reason to contemplate that, notwithstanding the Supreme Court's clear ruling in *PG&E* that states may not regulate based on safety concerns, Vermont's PSB or its General Assembly would attempt to do so. Indeed, the PSB itself appeared to understand at the time of the MOU that, where its scope of authority was limited by federal law, its "jurisdiction cannot be created by contract or waiver." Vt. Pub. Serv. Bd., Dkt. No. 6270, Order re: Mot. for Decl. of Bd. Jurisdiction, at 46-47 (Sept. 18, 2001); *see also id.* at 21 n.24 ("To the extent that

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the Board is preempted from modifying the Rule 4.100 contracts, the Board is preempted from modifying the contracts on any state-law basis, including principles of estoppel."); *id.* at 28 ("If the Board is preempted by federal law from granting the relief that the Utilities have requested, the Utilities have not explained how—nor even asserted that—the doctrine of estoppel can reestablish jurisdiction that has been federally preempted.").

58. The PSB ultimately decided to approve the sale to ENVY, issuing a CPG allowing ENVY to own, and ENOI to operate, the Vermont Yankee Station until March 21, 2012, and requiring ENVY and ENOI to seek a new CPG to operate the Vermont Yankee Station beyond that date. By explicitly approving the MOU (with the exception of certain terms not relevant here), the PSB also ordered that, absent the receipt of such a new CPG, ENVY and ENOI would be prohibited from operating the Vermont Yankee Station after that date, and would be permitted only to decommission the site.

V. THE VERMONT GENERAL ASSEMBLY'S ASSERTION OF AUTHORITY OVER THE VERMONT YANKEE STATION

59. As explained above, federal law preempts Vermont's efforts, through enactment and enforcement of the multiple statutes enacted by the Vermont General Assembly directed at the Vermont Yankee Station, to regulate the licensing and operation of the Vermont Yankee Station and/or to regulate or close the Vermont Yankee Station based on radiological safety concerns. Federal law preempts Vermont's efforts whether exercised through the PSB's assertion of authority to issue or deny a CPG, or through the assertion by the Vermont General Assembly of authority to control whether a CPG is issued.

A. The 2005 Act

60. On June 21, 2005, the Vermont General Assembly passed a law that both codified the PSB's purported role in the ultimate decision whether to allow the Vermont Yankee Station

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to operate after March 21, 2012, and inserted the General Assembly into the process of deciding whether the Vermont Yankee Station may operate after that date (specifically, by regulating storage of spent fuel generated by operations after that date). The 2005 Act states that "[c]ompliance with the provisions of this subchapter shall not confer any expectation or entitlement to continued operation of Vermont Yankee following the expiration of its current NRC operating license on March 21, 2012. Before the owners of the generation facility may operate the generation facility beyond that date, they must first obtain a certificate of public good from the public service board under Title 30." Vt. Stat. Ann. tit. 10, § 6522(c)(5).

61. The 2005 Act also provides that "[s]torage of spent fuel derived from the operation of Vermont Yankee after March 21, 2012 shall require the approval of the general assembly under this chapter." *Id.* § 6522(c)(4). (Spent fuel is stored at the Vermont Yankee Station only because the federal Department of Energy ("DOE") defaulted on a contract to remove the fuel and store it elsewhere. ENOI is actively pursuing litigation against the DOE to recover costs attributable to the agency's default in accordance with the federal NWPA, 42 U.S.C. §§ 10101-10270.)

B. The 2006 Act

62. On May 18, 2006, mere months after ENVY and ENOI applied for license renewal with the NRC, the Vermont General Assembly passed a law that further repudiated and breached the MOU by explicitly prohibiting the operation of the Vermont Yankee Station beyond March 21, 2012 absent express approval from the General Assembly, as opposed to approval by the PSB under the then "current law" that was expressly referenced in the 2002 MOU. The 2006 Act encroached further upon the NRC's exclusive authority over nuclear plant licensing and operation and over nuclear safety by injecting the State General Assembly itself into preempted areas of federal authority.

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63. Entitled "An Act Relating to a Certificate of Public Good for Extending the Operating License of a Nuclear Power Plant," the 2006 Act states that "[i]t remains the policy of the state that a nuclear energy generating plant may be operated in Vermont only with the explicit approval of the General Assembly." 2006 Vt. Acts & Resolves No. 160 ("Act 160"). The Act further provides:

> No nuclear energy generating plant within this state may be operated beyond the date permitted in any certificate of public good granted pursuant to this title, including any certificate in force as of January 1, 2006, unless the general assembly approves and determines that the operation will promote the general welfare, and until the public service board issues a certificate of public good under this section. If the general assembly has not acted under this subsection by July 1, 2008, the board may commence proceedings under this section and under 10 V.S.A. chapter 157, relating to the storage of radioactive material, but may not issue a final order or certificate of public good until the general assembly determines that operation will promote the general welfare and grants approval for that operation.

Vt. Stat. Ann. tit. 30, § 248(e)(2).

64. Act 160 changed the requirements for the Vermont Yankee Station to obtain a CPG in ways that could not have been predicted when ENVY purchased the Vermont Yankee Station and signed the MOU in 2002. The MOU subjected ENVY's and ENOI's continued operation of the Vermont Yankee Station after March 21, 2012 to a determination to be made by the PSB under then "current law." Because the PSB has "the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction," Vt. Stat. Ann. tit. 30, § 9, it is a quasi-judicial expert decision-maker, independent of legislative control, and its decisions must be supported by substantial evidence and be subject to judicial review.

65. Act 160, by contrast, supplanted this "current law" as it existed in 2002 with a decision-making process that placed ENVY's and ENOI's fate in the hands of elected political decision-makers, namely the State General Assembly and Governor. Under Act 160, these

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decision-makers could deprive ENVY and ENOI of the authority to operate the Vermont Yankee Station beyond March 21, 2012 for unsupported, unstated, or arbitrary reasons.

66. Act 160 thus gave the Vermont General Assembly an effective veto over the NRC's federal relicensing process in contravention of the express terms of the MOU, which provided for a decision by the PSB under "current law" as it existed in 2002.

67. Act 160 also expresses legislative concern with the radiological safety of the Vermont Yankee Station. Specifically, it mandates a study of various factors to inform the General Assembly's decision whether to authorize the PSB to consider granting a CPG, including "analysis of … public health issues." Vt. Stat. Ann. tit. 30, § 254(b)(2)(B).

68. On March 3, 2008, in an effort to accommodate Vermont's concerns and to avoid a lengthy and costly litigation over the State's authority given the restrictions imposed by federal law, ENVY and ENOI filed a petition for an amendment of its existing CPG to allow continued operation past March 21, 2012. Acknowledging that, under the 2006 Act, the PSB lacked authority even to commence a proceeding on the petition before July 1, 2008, absent legislative approval, ENVY and ENOI requested that the PSB set a timetable for proceedings to begin after July 1, 2008, and that it inform the General Assembly of its request.

C. The 2008 Act

69. On June 5, 2008, just a few months after ENVY and ENOI requested amendment of their CPG, the General Assembly passed "Act 189, An Act Relating to a Comprehensive Vertical Audit and Reliability Assessment of the Vermont Yankee Nuclear Facility." 2008 Vt. Acts & Resolves No. 189 ("Act 189"). This Act further injected the General Assembly into the Vermont Yankee Station relicensing process, encroaching further upon the NRC's exclusive authority over nuclear plant licensing and operation and over nuclear safety.

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70. Act 189 stated that its purpose was to provide a full assessment of the operation of the plant: "It is the purpose of this act to provide for a thorough, independent, and public assessment of the reliability of the systems, structures, and components of the Entergy Nuclear Vermont Yankee facility."

71. The breadth of Act 189's encroachment on the NRC's exclusive authority over nuclear plant licensing, operation, and safety is substantial. Among other requirements, the Act mandates a "comprehensive" state assessment of every aspect of plant operation and safety, requiring "an in-depth inspection" of all Vermont Yankee Station systems, including the plant's "electrical system," "emergency system," "mechanical system," "primary containment system," "heat removal system," "cooling system," and "underground piping system that carries radionuclides." Further, the Act sets forth the extent of the audit of each of these systems, making clear that it requires inquiry into essential aspects of plant construction, operation, and safety.

72. Act 189 requires thirteen separate areas of inquiry into each of the identified systems, including but not limited to assessment of: (1) whether the "design of the system [is] in keeping with the expected initial conditions and its design basis"; (2) whether "plant records adequately represent the as-built condition of the plant"; (3) "[w]hat changes or compensations have been made to accommodate unanticipated operations outcomes"; (4) the results of periodic testing and inspection of the systems; (5) whether "the management system for aging components [has] been adequately maintained to assure the components meet the design basis"; (6) all repairs, modifications, and redesigns to plant systems; and (7) the efficacy of plant operator training.

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73. Act 189 also authorized the PSB to commence proceedings on ENVY's and ENOI's CPG petition, but *not* to grant the petition. Thus, under Act 160, further legislative action would be required before the PSB could grant the petition.

74. The PSB's subsequent relicensing proceeding under Act 189 has involved state assessment of the radiological safety of the operation of the Vermont Yankee Station in violation of NRC's exclusive authority under federal law. The PSB ordered ENVY and ENOI to produce voluminous discovery relating to the operation and safety of the Vermont Yankee Station, including extensive testimony by nuclear engineers and extensive document production relating to the various plant systems specified in Act 189, such as testimony relating to the systems containing radionuclides. The DPS evaluated this information, in addition to conducting an on-site inspection of the plant, and created a "Comprehensive Reliability Assessment" of the safety and continued operation of the Vermont Yankee Station. The proceeding has also included numerous hearings on these subjects.

75. Given that the Vermont General Assembly has not yet provided it with authorization to act, the PSB may not rule on ENVY's and ENOI's request for relicensing beyond March 21, 2012.

76. In February 2011, Governor Shumlin—citing the discovery of tritium in monitoring wells that had previously shown negative results, but without citing any basis for concern about such discovery other than radiological safety—ordered the Vermont DPS to form a "Reliability Oversight Committee" to provide "additional expertise on oversight of Vermont Yankee issues within the state's jurisdiction." Press Release, Gov. Peter Shumlin Calls for Vermont Yankee Reliability Oversight Committee, Citing Tritium Leaks (Feb. 2011), *available at* http://governor.vermont.gov/newsroom-nuclear-oversight.

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D. The Vermont General Assembly's Further Repudiation of the MOU

77. On January 7, 2010, ENVY and ENOI confirmed that an on-site groundwater monitoring well contained detectable levels of tritium, a low-energy radionuclide that both occurs naturally in the environment and is a byproduct of nuclear power operations. ENVY and ENOI immediately notified the NRC and various Vermont agencies. After prompt attention that identified and addressed the leakage, ENVY and ENOI also undertook extensive remediation, including the removal of soil containing plant-related radionuclides and the extraction of hundreds of thousands of gallons of tritiated water.

78. Both the NRC and Vermont's State Nuclear Engineer determined that the tritium leakage had had no effect on public health, safety, or the off-site environment, and the Vermont Agency of Natural Resources ("ANR") determined that the level of tritium released to the off-site environment was orders of magnitude below the level authorized by ENVY's federal Clean Water Act permit, which ANR administers. Similarly, according to a study commissioned by Vermont's DPS, "ENVY's activities related to locating and excavating the AOG leaks were timely, appropriate, and planned effectively" (Nuclear Safety Associates, *Supplemental Report To the Comprehensive Reliability Assessment of the Vermont Yankee Nuclear Facility*, at 94 (Apr. 30, 2010) (redacted version)), and the leak "did not affect the overall reliability of the plant" (*id.* at 95).

79. Nonetheless, on February 23, 2010, weeks after discovery of the tritium leakage, the State Senate voted down multiple measures that would have permitted the PSB to consider whether to issue ENVY a CPG for operation after March 21, 2012.

80. Since the February 23, 2010 vote, legislators and officials have repeatedly stated that there is no chance the General Assembly will change its mind. For example, following the NRC's announcement on March 11, 2011, that it would renew the Vermont Yankee Station's

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license for an additional 20-year period, Governor Shumlin stated: "'Given the serious radioactive tritium leaks and the recent tritium test results, the source of which has yet to be determined, and other almost weekly problems occurring at this facility, I remain convinced that it is not in the public good for the plant to remain open beyond its scheduled closing in 2012.'" Dave Gram, *Vermont Yankee Gets Federal License Renewal*, BURLINGTON FREE PRESS, Mar. 11, 2011, *available at* http://www.burlingtonfreepress.com/apps/pbcs.dll/article?AID= 2011103110315.

81. Even if the PSB were re-vested with authority to issue a new CPG to the Vermont Yankee Station without prior General Assembly approval, the PSB's authority to regulate the operation and licensing of a nuclear power plant, or to regulate or close the plant based on safety concerns, is preempted by federal law. Any such redelegation of authority to the PSB would in any event confer authority that is irremediably tainted by the General Assembly's politicization of the process through the post-2002 enactments and the repeated statements by Governor Shumlin and other elected officials insisting that the Vermont Yankee Station must be shut down for public health or safety reasons. For example, Governor Shumlin recently stated during an interview on Vermont Public Radio that "I don't think you can convince most Vermonters today … that Vermont's best energy choice is to play Russian Roulette with an aging nuclear power plant." *Yankee Owner Tries New Strategy To Win Over Vermonters*, VPR NEWS, Mar. 31, 2011, *available at:* http://www.vpr.net/news_detail/90481/. Governor Shumlin also stated that "more states should follow Vermont's lead …[by] 'tak[ing] control into their own hands about aging plants.'" Alan Wirzbicki, *Vermont's Unique Nuclear Power Veto*, BOSTON GLOBE, Mar. 23, 2011, *available at:* http://www.boston.com/bostonglobe/editorial_opinion/blogs/the_angle/2011/03/vermonts_unique.html.

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E. Vermont's Attempts to Extract Power Rates for In-State Retail Electric Utilities Below the Rates Authorized By FERC

82. As an alternative to Vermont's effort to shut down the Vermont Yankee Station as of March 21, 2012, Vermont officials have also attempted, as a condition of any continued authorization of Vermont Yankee Station's operations, to exact wholesale rate concessions from ENVY for Vermont retail utilities, thereby invading FERC's exclusive jurisdiction over wholesale interstate power sales.

83. Specifically, legislators and other Vermont officials have demanded ENVY's agreement to a PPA under which the Vermont retail electric utilities to which the wholesale power produced by the Vermont Yankee Station is sold – but not ENVY's out-of-state wholesale customers – would receive power at below-market rates. Any such agreement would expressly discriminate against out-of-state retail utilities and would result in ENVY effectively subsidizing Vermont consumers as compared to out-of-state consumers.

84. For example, Governor Shumlin, when he has not been opposing continued operation of the Vermont Yankee Station altogether, has been quoted as saying that "'there's no way we're going to vote to re-license the plant unless Vermonters are getting a great deal'" (Stephanie Kraft, *Vermont, Entergy Square Off*, THE VALLEY ADVOCATE (Northampton, Mass.), Jan. 22, 2009), and that "'to get an affirmative vote out of this Legislature, Vermonters would have to have a very good power price'" (John Dillon, *Lawmakers Set Deadline for Vermont Yankee Power Deal*, VPR NEWS, July 28, 2009). A state representative has said that any refusal by ENVY to provide favorable prices for Vermont utilities would be a "'deal-breaker.'" Kraft, *supra*.

85. The DPS has likewise stated that, "[i]f Entergy has any expectation for continued operation, it has to include a favorable purchase agreement. … We would not support relicensure

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until such a time that there is a PPA that is favorable to Vermonters." Bob Audette, *DPS Approves Enexus Spinoff Plan*, BRATTLEBORO REFORMER, Oct. 8, 2009.

86. Any state-law requirement that ENVY sell wholesale power to in-state retail utilities at specified or favorable rates (compared to wholesale sales to out-of-state utilities), as a condition of continued operations, is preempted by the FPA, which gives FERC exclusive authority over power sales by a producer in the wholesale interstate market.

87. Any state-law requirement that ENVY favor in-state retail utilities over out-of-state utilities as a condition of continued operations additionally violates the Commerce Clause, U.S. Const. art. I, § 8, because it is facially discriminatory against out-of-state commerce.

Claims For Relief

COUNT I
ATOMIC ENERGY ACT PREEMPTION
(Declaratory Judgment and Injunctive Relief)

88. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above in paragraphs 1 through 87 as if fully set forth herein.

89. The AEA vests in the NRC exclusive jurisdiction over the licensing and operation of nuclear power facilities. State laws and regulations requiring a state license for plant operation or otherwise having a direct and substantial effect on plant operation are preempted under the Supremacy Clause, U.S. Const. art. VI.

90. Vermont's statutes and regulations asserting state authority over the operation and safety of the Vermont Yankee Station, including the authority to bar its continued operation without a state CPG, are invalid under the Supremacy Clause because they interfere with the NRC's exclusive jurisdiction over the licensing or operation (including storage of spent nuclear fuel) of a federally licensed nuclear power station. Specifically, the PSB has asserted authority to

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prohibit ENVY and ENOI from operating the Vermont Yankee Station altogether after March 21, 2012 without the PSB's approval in the form of a new CPG. And the Vermont General Assembly has asserted authority to bar the operation of the Vermont Yankee Station after March 21, 2012, unless the General Assembly passes a further measure stating that continued operation of the Vermont Yankee Station "promotes the general welfare" and thus permits the PSB to issue ENVY and ENOI a CPG. The General Assembly has already voted against measures that would permit the PSB to award a CPG to ENVY and ENOI for operations after March 21, 2012.

91. Vermont's laws and regulations asserting authority to regulate the operation of the Vermont Yankee Station and to shut down the Vermont Yankee Station as of March 21, 2012, are also preempted for the independent reason that they are aimed at safety concerns that are the exclusive province of the NRC. For example, the 2006 Act expressly requires analysis of "public health" effects of the Vermont Yankee Station, and Vermont legislators and officials, including Governor Shumlin, have frequently identified safety as their rationale for shutting down the Vermont Yankee Station as of March 21, 2012.

92. Shut-down of the Vermont Yankee Station would not provide Vermont with economic benefit or with a more reliable electricity supply. To the contrary, it would lead to higher electricity costs both inside and outside Vermont, increased risk of thermal overloads and voltage gaps, substantial job loss, diminished tax revenues, and increased greenhouse gas emissions. As former Governor Douglas observed in 2009:

> [W]e must not lose sight of the fact that Vermont Yankee provides a source of power with relatively low carbon emissions, thus helping to limit our greenhouse gas emissions. Now that the cost of carbon is a part of the price that consumers pay for electricity, losing this source of power from our regional portfolio would likely lead to higher costs for ratepayers.
>
> ...

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> Vermont Yankee supports the region with over 600 high paying jobs, helping to infuse money into the local, state and regional economies, as well as additional tax revenue for the state. The Clean Energy Development Fund receives millions of dollars each year from Entergy to fund renewable projects throughout the state. In addition to local impacts, Vermont Yankee is responsible for providing power to neighboring states through the regional grid.

Letter from Gov. James H. Douglas, Governor of the State of Vermont, to Hon. Donald G. Milne, Clerk of the Vermont House of Representatives, at 2, 4 (May 22, 2009).

93. The present risk that Vermont will order ENVY and ENOI to shut down the Vermont Yankee Station has immediate and imminent consequences for ENVY and ENOI, which already have suffered abnormal employee attrition, must make potentially expensive decisions concerning the continued operation of the plant beginning as early as July 7, 2011, and would have to file a potentially irreversible certification of the permanent cessation of operations with the NRC on March 21, 2012, if the Vermont Yankee Station is shut down.

94. The present risk that Vermont will order ENVY and ENOI to shut down the Vermont Yankee Station also has immediate and imminent consequences for the reliability of service in Vermont and surrounding areas. ISO-NE's studies of the effect of losing Vermont Yankee Station's capacity in 2013 found:

> [W]ith or without Vermont Yankee, the system in Vermont has reliability issues that must be addressed; without Vermont Yankee in service, those issues are more severe and could affect neighboring areas. The potential reliability issues could include thermal overloads on high-voltage transmission lines and voltage instability, either of which could damage equipment, compromise grid stability, or cause uncontrolled outages.

Given these reliability impacts from shutting down Vermont Yankee Station, a prompt determination of whether Vermont Yankee Station may continue to operate after March 21, 2012 is necessary so that ISO-NE will have sufficient time to take appropriate steps to try to preserve reliable service in the region.

95. Thus, an actual controversy exists between Plaintiffs and Defendants concerning whether federal law preempts Defendants, through either its PSB or its General Assembly and Governor, from stopping, interfering with, or imposing conditions upon the continued operation of the Vermont Yankee Station after March 21, 2012.

96. Plaintiffs seek a declaration that Defendants are preempted from stopping or interfering with the federally licensed operation of the Vermont Yankee Station as of March 21, 2012.

97. Plaintiffs seek a preliminary and permanent injunction against any action by Defendants to stop or interfere with the federally licensed operation of the Vermont Yankee Station as of March 21, 2012.

COUNT II
FEDERAL POWER ACT PREEMPTION
(Declaratory Judgment and Injunctive Relief)

98. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above in paragraphs 1 through 97 as if fully set forth herein.

99. The Vermont Yankee Station is a merchant electricity plant that sells its power at wholesale on the interstate market for power. Through the FPA, Congress has vested FERC with exclusive jurisdiction to regulate wholesale power sold in the interstate market.

100. FERC has authorized wholesale sales of the Vermont Yankee Station's power at market rates at all times since ENVY purchased the Vermont Yankee Station in 2002.

101. In light of FERC's exclusive jurisdiction, neither the PSB nor any other state actor has the authority to dictate whether wholesale power is sold from the Vermont Yankee Station, much less the rates, terms, or conditions of any such sales.

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102. Despite FERC's exclusive jurisdiction over power sold at wholesale from the Vermont Yankee Station, Vermont officials have sought to use legislative and regulatory CPG processes to force ENVY to sell wholesale power to Vermont wholesale customers (*i.e.*, Vermont retail utilities) at below-market prices. This condition coerces ENVY to enter into below-market PPAs with Vermont's retail utilities that will effectively result in ENVY subsidizing the electricity bills of Vermont's consumers and thus treating them preferentially as compared with out-of-state consumers.

103. The Vermont General Assembly has conditioned its vote to allow proceedings for CPG renewal on ENVY's agreement that the Vermont Yankee Station will sell wholesale power (subject to FERC's exclusive jurisdiction) to Vermont retail utilities at below-market rates.

104. Furthermore, Vermont officials have taken the position before the PSB that no renewed CPG should be issued unless ENVY agrees that the Vermont Yankee Station will sell wholesale power to Vermont retail utilities at below-market rates.

105. The present risk that Defendants will order ENVY to shut down the Vermont Yankee Station unless ENVY sells wholesale power at below-market rates has immediate and imminent consequences for ENVY, which must make potentially expensive decisions concerning the continued operation of the plant.

106. Thus, an actual controversy exists between Plaintiffs and Defendants concerning whether federal law preempts Defendants from prohibiting the operation of the Vermont Yankee Station after March 21, 2012, unless ENVY agrees to sell wholesale power at below-market rates.

107. Plaintiffs seek a declaration that federal law preempts Defendants from conditioning any state approval of the Vermont Yankee Station's continued operation after March 21, 2012 on ENVY's sale of wholesale power to Vermont retail electric utilities at

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specified rates or rates favorable to those that would be charged by ENVY to out-of-state retail utilities in the wholesale interstate market.

108. Plaintiffs further seek a preliminary and permanent injunction prohibiting Defendants from ordering ENVY to shut down the Vermont Yankee Station on this preempted basis.

COUNT III
UNCONSTITUTIONAL BURDEN ON INTERSTATE
COMMERCE UNDER COMMERCE CLAUSE AND 42 U.S.C. § 1983
(Declaratory Judgment and Injunctive Relief)

109. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above in paragraphs 1 through 108 as if fully set forth herein.

110. Vermont officials, acting under color of state law, have repeatedly threatened that the Vermont Yankee Station will be unable to get a CPG unless and until it enters into PPAs with Vermont retail utilities that favor those utilities over out-of-state retail electric utilities by requiring ENVY to provide them with wholesale electricity at below-market rates.

111. Because the decision whether the Vermont Yankee Station receives a CPG rests with Vermont officials, their attempt to condition the grant of a CPG upon ENVY's agreement to enter into PPAs that discriminate in favor of Vermont retail utilities is coercive and places direct and substantial burdens on interstate commerce in the wholesale electricity market.

112. Defendants' impermissible burdens on the interstate wholesale electricity market have deprived Plaintiffs of their "rights, privileges and immunities" under the Commerce Clause, U.S. Const. art. I, § 8.

113. Thus, an actual controversy exists between Plaintiffs and Defendants concerning whether the Commerce Clause prevents the State of Vermont, through Defendants, from

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requiring ENVY to enter into PPAs that favor Vermont retail electric utilities over out-of-state retail electric utilities as a condition of receiving a CPG for operations after March 21, 2012.

114. Plaintiffs seek a declaration that the Defendants' insistence that ENVY provide preferential wholesale electricity rates to Vermont retail electric utilities as a condition of continued operation after March 21, 2012 violates the Commerce Clause.

115. Plaintiffs further seek a preliminary and permanent injunction prohibiting Defendants from ordering ENVY and ENOI to shut down the Vermont Yankee Station on this unconstitutional basis.

Prayer For Relief

In light of the foregoing, ENVY and ENOI respectfully pray that this Court:

A. Issue a declaratory judgment, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and Rule 57 of the Federal Rules of Civil Procedure, that:

i. federal law preempts the Defendants from requiring ENVY and/or ENOI to receive legislative or regulatory approval of a CPG in order to operate the Vermont Yankee Station after March 21, 2012; to deliver power from that facility to the interstate grid after March 21, 2012; or to store at the Vermont Yankee Station spent nuclear fuel deriving from post-March 21, 2012 operations at the Vermont Yankee Station;

ii. federal law preempts Defendants from conditioning the Vermont Yankee Station's continued operation after March 21, 2012 upon ENVY's agreement to provide below-market wholesale electricity rates to Vermont retail utilities; and

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iii. the Commerce Clause prohibits Defendants from conditioning the Vermont Yankee Station's continued operation after March 21, 2012 upon agreement to provide below-market wholesale electricity rates to Vermont customers;

B. Issue a preliminary and permanent injunction, pursuant to 28 U.S.C. § 1651(a), 42 U.S.C. § 1983, and Rule 65 of the Federal Rules of Civil Procedure, (1) enjoining Defendants from enforcing Vermont statutes, regulations, or other laws (including without limitation Act 160, Act 189, and Vt. Stat. Ann. tit. 30, § 248(e)(2)) purporting to regulate the operation and licensing and/or the radiological safety of the Vermont Yankee Station, (2) further enjoining Defendants from undertaking any steps, based upon Vermont's or its officials' denial of a CPG, to shut down or make preparations to shut down the operation of the Vermont Yankee Station as of March 21, 2012, or to prevent the Vermont Yankee Station from delivering power from that facility to the interstate grid after March 21, 2012, or to prohibit the storage at the Vermont Yankee Station of spent nuclear fuel deriving from post-March 21, 2012 operation of the Vermont Yankee Station, and (3) further enjoining Defendants from conditioning the Vermont Yankee Station's continued operation after March 21, 2012 upon ENVY's agreement to provide below-market wholesale electricity rates to Vermont retail utilities;

C. Award reasonable attorneys' fees and costs;

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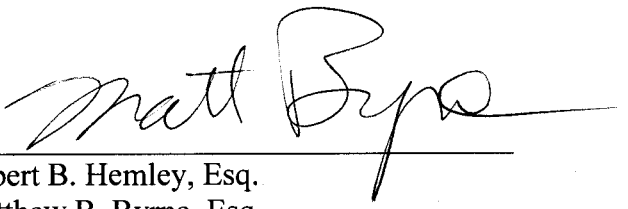
D. Award such other relief available under the law that may be considered appropriate under the circumstances, including other fees and costs of this action to the extent allowed by the law.

Dated: Burlington, Vermont
April 18, 2011



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